(24)

No. 90-97

In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

The National Labor Relations Board has promulgated a regulation specifying the eight types of units that—in the absence of extraordinary circumstances—will be recognized as appropriate for collective bargaining in acute-care hospitals. The questions presented are:

1. Whether the regulation violates the provision of Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), that the "Board shall decide [the appropriate bargaining unit] in each case."

2. Whether the regulation is consistent with 1974 amendments to the National Labor Relations Act that extended the Act to nonprofit health care institutions, and with statements in the amendments' legislative history admonishing the Board to give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry."

3. Whether the regulation is arbitrary and capricious in prescribing the same bargaining units for all acute care hospitals absent a showing of extraordinary circumstances.

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STATEMENT

In 1974, Congress extended the National Labor Relations Act to nonprofit health care institutions. For the next 13 years, hospitals, labor organizations, and the National Labor Relations Board engaged in sharp disputes —aptly characterized by one commentator as a "conceptual World War I," 4 T. Kheel, *Labor Law* § 14.03[7] (1989)—concerning the units appropriate for collective bargaining in those institutions. In 1987, to end unproductive controversy and to facilitate the exercise of rights protected by the Act, the Board initiated its first major substantive rulemaking proceeding.

Over the course of the next two years, the Board assembled information concerning conditions in the health care industry and refined its proposed rule. Relying on the rulemaking record and on experience derived from

numerous adjudications of hospital bargaining units, the Board determined that "acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units" and that "the policies of the Act would better be effectuated by the establishment of appropriate units in [certain] segments of this industry by exercise of the Board's * * * rulemaking authority." J.A. 189.

The regulation embodying this judgment applies to "acute care hospitals," a defined category of institutions engaged primarily in providing short-term patient care. J.A. 261. The regulation provides for eight bargaining units (which may or may not be organized in a given hospital and in which the placement of certain individual employees will be resolved through adjudication): two units of professionals (registered nurses and doctors), three units of nonprofessionals (technical employees, skilled maintenance employees, and business office clericals), two residual units (all other professionals and all other nonprofessionals), and, as required by the statute, a separate unit of guards. J.A. 259-260; see 29 U.S.C. 159(b)(1) and (3). There are several exceptions. A union may seek to represent a combination of the units prescribed by the regulation; the Board's regional directors are authorized to approve stipulations providing for different units; and the rule allows for departures in the case of "extraordinary circumstances" (which are deemed present when application of the regulation would yield a unit containing five or fewer employees). J.A. 260-261.

Reversing a decision by the district court, the court of appeals sustained the regulation against petitioner's claim that it is invalid on its face. Pet. App. 1a-16a.

A. The 1974 Amendments to the National Labor Relations Act

Between 1947 and 1974, the National Labor Relations Act exempted nonprofit hospitals from its coverage. Amendments to the NLRA enacted in 1974 repealed that exemption; Congress found "that improvements in health

care would result from the right to organize, and that unionism is necessary to overcome the poor working conditions retarding the delivery of quality health care." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 499-500 (1978).

The rights conferred on hospital employees by the 1974 legislation—like those conferred on all other covered employees—include the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157. Under Section 9(a) of the NLRA, 29 U.S.C. 159(a), a representative designated or selected for the purpose of collective bargaining by the majority of the employees "in a unit appropriate for such purposes" is empowered to act as the employees' exclusive representative. Section 9(b), 29 U.S.C. 159(b), provides that the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." That determination is made, in a proceeding conducted in accordance with Section 9(c) of the Act, 29 U.S.C. 159(c), when the Board is called upon to resolve a dispute over recognition of an exclusive bargaining representative.

Although Senator Taft introduced a bill that would have amended the Act to specify five bargaining units for employers in the health care industry,[1] Congress ultimately chose simply to extend the Board's broad authority over bargaining unit determinations to that industry. As part of a compromise that led to passage of the 1974 amendments, however, the following statement—referred to herein as the "admonition"—was included in the committee reports: [2]

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[1] S. 2292, 93d Cong., 1st Sess. (1973). See pp. 35-38, *infra*.

[2] S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974) (*reprinted in* Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Rela-*

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 N.L.R.B. No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).*

* By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

B. The Conflict Among the Courts of Appeals over Hospital Bargaining Units

For more than a decade after the 1974 amendments, there were sharp disputes over what bargaining units were appropriate in health care institutions. Although the courts often faulted the Board for failing to heed the admonition, they reached varying conclusions concerning its effect. One group of courts ruled, in substance, that the Board should supplement the "community of interest" approach that had traditionally guided its bargaining unit determinations by also considering whether recognition of a particular unit would be consistent with the admonition.[3] The Ninth and Tenth Circuits went farther, ruling that the admonition obligated the Board to adopt a different test—the "disparity of interests" test—

tions Act, 1974, at 8, 12 (Comm. Print 1974) [hereinafter *1974 Leg. Hist.*]; H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6-7 (1974) (*reprinted in 1974 Leg. Hist.* 269, 274-275).

[3] *E.g.*, *NLRB* v. *Mercy Hosp. Ass'n*, 606 F.2d 22 (2d Cir. 1979), cert. denied, 445 U.S. 971 (1980); *Trustees of Masonic Hall & Asylum Fund* v. *NLRB*, 699 F.2d 626, 633-635 (2d Cir. 1983); *St. Vincent's Hosp.* v. *NLRB*, 567 F.2d 588 (3d Cir. 1977); *NLRB* v. *Frederick Memorial Hosp.*, 691 F.2d 191, 194 (4th Cir. 1982); *Mary Thompson Hosp.* v. *NLRB*, 621 F.2d 858, 862-864 (7th Cir. 1980).

calculated to yield broader units.[4] Finally, after the Board had cited the admonition as a basis for shifting to a disparity of interests test, *St. Francis Hosp.*, 271 N.L.R.B. 948 (1984), the D.C. Circuit held that the Board had erred in concluding that the congressional admonition was an "independent source[] of law" requiring abandonment of the community of interest approach. *International Bhd. of Elec. Workers* v. *NLRB*, 814 F.2d 697, 715 (1987).

C. The Rulemaking Proceeding

In a notice of proposed rulemaking issued three months after the D.C. Circuit's *IBEW* opinion, the Board candidly described the upshot of these decisions: "Thirteen years and many hundreds of cases later, the Board finds that despite its numerous, well-intentioned efforts to carry out congressional intent through formulation of a general conceptual test, it is now no closer to successfully defining appropriate units in the health care industry than it was in 1974." J.A. 9; see also J.A. 5. To remedy that situation, the Board initiated a substantive rulemaking proceeding.[5]

1. a. In the *Federal Register* notice initiating the proceeding (J.A. 3-39), the Board outlined the two principal reasons why it had decided to engage in rulemaking. The

[4] *NLRB* v. *St. Francis Hosp.*, 601 F.2d 404, 419 (9th Cir. 1979); *NLRB* v. *HMO Int'l/California Medical Group Health Plan, Inc.*, 678 F.2d 806, 810 (9th Cir. 1982); *Presbyterian/St. Luke's Medical Center* v. *NLRB*, 653 F.2d 450, 457-458 n.6 (1981), modified *sub nom. Beth Israel Hosp. & Geriatric Center* v. *NLRB*, 688 F.2d 697 (10th Cir. 1982); *St. Anthony Hosp. Systems, Inc.* v. *NLRB*, 884 F.2d 518, 521 (10th Cir. 1989).

[5] In the course of the rulemaking, the Board issued three notices, including two proposed rules and the final regulation, devoting exhaustive attention to a host of issues. Space permits only a brief summary of the Board's treatment of the issues bearing most directly on the questions presented; for the Court's convenience, however, we have appended a table of contents correlating the headings in the notices to the joint appendix's pagination. App., *infra*, 1a-7a.

first was to obtain empirical data on conditions material to bargaining unit determinations. The Board observed that bargaining unit determinations should be calculated to "effectuate section 7 rights by permitting bargaining in cohesive units," while also weighing "Congress's expressed desire to avoid proliferation in order to avoid disruption in patient care, unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages, and increased costs due to whipsaw strikes and wage leapfrogging." J.A. 12. Although noting its own prior "broad generalizations" regarding these matters, the Board acknowledged that "it [had] never obtained empirical data" on them. J.A. 12.

Second, the Board observed, on the basis of its "extensive experience" in bargaining unit adjudications, that groups of employees seeking to exercise their collective bargaining rights "generally exhibit the same internal characteristics and relationship to other groups of employees, in one health care facility as do like groups of employees at other facilities." J.A. 12-13. Thus, the Board continued, "laborious, costly case-by-case record-making and adjudication in this remarkably uniform field has proved to be an unproductive expenditure of the parties' and the taxpayers' funds," and "rulemaking, though perhaps time consuming at the outset, [would] be a valuable long-term investment, paying dividends in the form of predictability, efficiency, and more enlightened determinations as to viable appropriate units, leading ultimately to better judicial and public acceptance." J.A. 14; see also J.A. 46-48, 59-60.

In keeping with the Board's desire for detailed information on conditions in the health care industry, the notice of proposed rulemaking specified a number of issues —regarding "how various bargaining units affect legitimate concerns of both unions and health care employers" (J.A. 19)—on which it hoped to obtain "actual, empirical, practical evidence" (J.A. 20). The Board published a proposed regulation providing for six appropriate bargaining units in acute care hospitals with more than 100

beds, and four appropriate units in acute care hospitals with 100 beds or fewer and in nursing homes. J.A. 37-39.

b. The Board conducted four public hearings, covering 14 days, at three locations and received numerous written comments. In all, it received testimony, both on direct and cross-examination, from 144 witnesses and written comments from 315 individuals and organizations in all sectors of the health care industry. J.A. 42-45. After considering the proposed regulation in open session, the Board issued a second notice of proposed rulemaking. J.A. 40-202. This notice refined the proposed regulation, addressed arguments directed at the Board's authority and the wisdom of proceeding through rulemaking, and explained in detail the justifications for each bargaining unit prescribed by the regulation, as well as other features of the regulation. The Board's stated goal was (J.A. 67)

> to create a reasonable number of units that will realistically reflect pronounced natural groupings to be found in health care facilities: groupings that will not be so large that organizing them is exceedingly difficult, and representing them even harder because of inherent conflicts of interest within the groups; but large enough that unnecessary, repetitious rounds of bargaining are avoided along with such undesirable results as frequent strikes, wage whipsawing, and jurisdictional disputes.

The second notice made various changes in the proposed regulation. The Board eliminated its proposed 100-bed distinction for acute care hospitals, noting that "[t]he vast majority of representatives of both unions and employers appeared to agree that hospital size is not well correlated with integration or division of labor, and opposed a rule differentiating between large and small hospitals." J.A. 162. At the same time, the Board narrowed the regulation to exclude nursing homes and psychiatric hospitals, finding that the characteristics of these facilities, as well as variations among them, made a uniform rule inappropriate. J.A. 165-176.

The Board also modified its initial proposal with respect to units that would be recognized as appropriate for collective bargaining. While the initial proposal provided for six types of units in large acute care hospitals, the modified regulation prescribed eight for all such facilities: registered nurses, physicians, other professionals, technical employees, skilled maintenance employees, business office clerical employees, guards, and other nonprofessional employees. The Board explained in detail its reasons for recognizing each individual unit, canvassing factors common to both the "community of interest" and "disparity of interests" tests. J.A. 91-161; see J.A. 67-68.

The second notice of proposed rulemaking also explained the scope of the regulation's exception for "extraordinary circumstances." J.A. 186-190. The purposes of the exception, the Board said, were to protect parties' due process rights, "to allow for the possibility of individual treatment of uniquely situated acute care hospitals," and "to avoid accidental or unjust application of the rule." J.A. 186-187. To assure that the exception would not provide "an excuse, opportunity, or 'loophole' for redundant or unnecessary litigation and the concomitant delay that would ensue" (J.A. 187), the Board indicated it would construe the exception to foreclose relitigation of issues resolved in the rulemaking (J.A. 187-190; see also J.A. 231 n.5, 244-246).

c. The Board provided a further period for public comment. On April 21, 1989, after considering an additional 1500 comments, the Board published its final regulation accompanied by a further explanatory statement. J.A. 203-262. The final regulation amended the second proposal by specifying that a request for a unit of five or fewer employees would constitute an extraordinary circumstance within that exception to the regulation (J.A. 231-232) and by excluding rehabilitation facilities and drug treatment centers (J.A. 239-240).

2. During the course of the rulemaking, the Board carefully considered and rejected each of the contentions that petitioner advances in this Court.

a. The Board concluded that Section 9(b)'s "in each case" language should not be construed to limit the rulemaking authority conferred by Section 6 of the Act, 29 U.S.C. 156. J.A. 211-215; see J.A. 15-19, 46-48. Application of the regulation at issue was not inconsistent with the Board's obligation to determine an appropriate bargaining unit "in each case," the Board explained, since it would continue to decide the appropriate unit in individual Section 9(c) cases. J.A. 214. The Board noted that it had "long made use of 'rules' of general applicability" formulated in adjudications to determine appropriate units. J.A. 213. It also found support for its position in this Court's decision in *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983), and in cases and commentary stressing the advantages of rulemaking. J.A. 15-18, 46-48, 213-218 & n.2.

b. Although the Board observed in its final notice that it was "inclined to agree" with the D.C. Circuit's conclusion that the congressional admonition did not impose a binding obligation on the Board (J.A. 247-248), the Board was "mindful of avoiding undue proliferation, not only because this desire was expressed in the legislative history, but also because it accords with our own view of what is appropriate in the health care industry" (J.A. 66; see J.A. 25-26). Accordingly, in justifying the units prescribed by the regulation, the Board expressly determined that both the particular units specified and the scheme as a whole were consistent with the congressional admonition. J.A. 114, 120, 122, 131, 140-141, 145-146, 158-159, 191-194, 246-254.

c. The Board acknowledged that there were variations among hospitals (J.A. 49-50), but viewed the "relevant question" as "whether, despite surface differences, there are such similarities that certain institutions may properly be grouped as a class" (J.A. 53). After analyzing claims that changes in the industry, differences among hospitals, cost pressures, and hospitals' need for flexibility foreclosed a uniform rule (J.A. 56-59), the Board found that "[s]uch diversity as exists has not been shown to be sufficiently significant to preclude uniform treatment

for purposes of establishing the general contours of appropriate bargaining units for acute care hospitals in all but truly extraordinary facilities" (J.A. 57-58). In justifying particular units, moreover, the Board cited particular circumstances warranting similar treatment of categories of employees in all but exceptional acute care hospitals. *E.g.*, J.A. 93-94, 97, 98, 101 (nurses); J.A. 125, 131-132 (technical employees); J.A. 137, 144, 153, 155 (skilled maintenance employees).[6]

D. Proceedings in the Lower Courts

1. Petitioner challenged the regulation on its face in a suit filed in the United States District Court for the Northern District of Illinois. Although the district court concluded that the "in each case" language of Section 9(b) did not prohibit the regulation (Pet. App. 35a), it ruled that the admonition in the legislative history of the 1974 amendments required the Board to "use the means least likely to cause unit proliferation to achieve [its] objective" (*id.* at 38a). Observing that it could "envision other divisions, perhaps fewer divisions, in the varied health institutions which would be [as] reasonable" as the units the Board had chosen, the court concluded that the regulation was inconsistent with the admonition and enjoined its implementation. *Id.* at 38a, 41a-42a.

2. The court of appeals reversed. Pet. App. 1a-16a. It rejected petitioner's contention that the "in each case" language of Section 9(b) precluded the Board's regulation. Finding "no reason why Congress might have wanted to carve out unit determinations from the grant of rulemaking power in section 6 and no indication beyond the ambiguous semantics of the word 'case' that it did want to do this," the court concluded "that unit determinations [are] not excepted from the Board's power under that section." Pet. App. 8a.

[6] Board Member Johansen dissented from the orders issuing the second proposed regulation and the final regulation. J.A. 198-202, 255-258. He concluded that the "in each case" language in Section 9(b) of the Act foreclosed establishing bargaining units through rulemaking and that rulemaking was not necessary or desirable in any event.

The court of appeals also held that the regulation was consistent with the 1974 admonition. The court concluded that the admonition "is entitled to our respectful consideration," but is "not an amendment to section 9(b), decreeing that in the health-care industry no more than three separate bargaining units shall be authorized" (Pet. App. 12a). "[E]ven if [the admonition] were a statute" (*ibid.*), the court continued, Congress's concern had focused on "finer divisions of the health-care work force than attempted in the rule under challenge" (*id.* at 14a), and nothing in the admonition "reads on the issue of the propriety of eight units" (*id.* at 13a).

Finally, the court rejected petitioner's contention that the Board's regulation "is arbitrary because it lumps together hospitals of different sizes and missions in different locations" (Pet. App. 14a). The court observed that the very nature of a regulation is to make "one or a few of a mass of particulars legally decisive, ignoring the rest"; the "result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice" (*id.* at 15a). Finding that the Board "did a responsible job of weighing the conflicting arguments" (*id.* at 16a), the court of appeals upheld the regulation.

SUMMARY OF ARGUMENT

One of the great strengths of the administrative process is that agencies are able, through the promulgation of rules, to narrow and define the scope of the issues for adjudication. The regulation challenged in this case is an example of the working of this process at its best. It should not be set aside by adopting the petitioner's strained construction of the National Labor Relations Act, by giving unwarranted meaning and weight to a fragment of legislative history, or by failing to recognize the firm foundation for the Board's findings and conclusions.

1. The challenged regulation is consistent with Section 9(b) of the NLRA. The statutory direction to the Board

—to "decide in each case * * * the unit appropriate for the purpose of collective bargaining"—is a direction to conduct individual unit determination proceedings whenever a question of representation is properly presented. It is not in any sense a restriction on the Board's authority to formulate rules of decision to narrow and define the scope of the issues in those proceedings. It is not, in short, a requirement that every representation proceeding must be treated as a case of first impression.

Section 9(b) is a broad grant of discretion to the Board to determine appropriate bargaining units. But a grant of broad discretion is in no way inconsistent with the use of rulemaking authority to implement an agency's judgment that an issue should be resolved one way in a class of cases. *Heckler* v. *Campbell*, 461 U.S. 458 (1983); *Fook Hong Mak* v. *INS*, 435 F.2d 728 (2d Cir. 1970) (Friendly, J.). That is precisely what the Board has done here.

The "in each case" language, so heavily relied on by petitioner, does not invalidate this exercise of the Board's authority. The language was added to the 1935 Act as a clarifying amendment to insure that application of the governing rules will occur in a decision tailored to the particular case—a decision following a proceeding in which the parties are able to raise all relevant questions about the proper application of those rules. There is no basis whatever in the language or history of the amendment for the far more radical, and destructive, reading advocated by petitioner. Moreover, petitioner's reading is inconsistent with the Board's practice over the years of adopting rules of decision to govern in unit determination cases. Nor can petitioner's reading be squared with this Court's interpretation of the scope of agency authority under other, similar statutes.

2. The Board's rule is fully consistent with the 1974 amendments to the NLRA. Petitioner's heavy reliance on the admonition in the committee reports accompanying that legislation is misplaced. The admonition is perhaps most significant as the residue of what Congress

failed to include in the statute—despite the best efforts of petitioner and others. And in any event, it in no way changes the character of the Board's authority under Section 6 to promulgate rules of decision designed to narrow and define the issues in representation proceedings.

Moreover, whatever requirements may be imposed on the Board by the admonition were fully satisfied in this proceeding. At the outset of the rulemaking, the Board sought answers to empirical questions bearing on the potential evils of undue proliferation of bargaining units, and then exhaustively analyzed the data received in its explanation of its revised proposal. In that statement, the Board explained in detail why neither the regulation as a whole nor any of the individual units prescribed would contribute to those evils or otherwise run afoul of the admonition.

3. The regulation is not arbitrary, capricious, or an abuse of discretion. The standard of review is one that requires deference to the Board's analysis and expertise, but the Board's exhaustive consideration of the materials presented, and its careful explanation of the basis for its action, would survive attack even under a far more rigorous standard. Petitioner's effort to attack the regulation as an unexplained departure from prior Board rulings fails both because it mischaracterizes many of those rulings and because the Board has fully explained the basis for those changes in policy that the regulation does embody. And petitioner's challenge to the regulation on the ground that the Board has overlooked significant variations among health care institutions also fails. The Board did take account of those variations it regarded as material, and it fully justified its conclusion that other variations do not require disparate treatment of acute care hospitals in unit determination proceedings.

ARGUMENT

I. THE HOSPITAL BARGAINING UNIT REGULATION IS CONSISTENT WITH SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT

Since 1935, the Board has conducted proceedings to determine whether an employer is required to recognize a collective bargaining representative for a group of employees. At present (see note 17, *infra*), Section 9(c) of the NLRA, 29 U.S.C. 159(c), permits employees, labor organizations, and employers to file petitions seeking such a determination. In the ensuing proceeding, the Board decides, among other issues, whether the unit proposed in the petition, or some other unit, is an appropriate unit for collective bargaining.

Section 9(b) supplies the basic standard for those determinations; it directs the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In this case, the Board has employed its statutory rulemaking authority to give specificity to that standard in its application to a particular category of employers—acute care hospitals. Because it is the Board's judgment that "acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units" (J.A. 189), the regulation is expressed in terms of the units that, in the absence of extraordinary circumstances, will be recognized as appropriate for that group of employers. The issue here is whether Section 9(b)'s "in each case" language precludes this exercise of the Board's rulemaking power. The question, in other words, is whether those three words require significant curtailment of one of the major advantages of the administrative process—the ability of an agency to narrow and define the scope of issues through the promulgation of rules.

In the explanatory statement accompanying the Final Rule, the Board took care to explain why it believed the "in each case" language imposed no such limitation on its rulemaking power. J.A. 214; see J.A. 15-17, 47, 212-215. The Board reasoned (J.A. 214):

> There is nothing inconsistent between section 9(b) and the Board's use of its APA rulemaking power. Section 9(b) requires the Board to decide the appropriate unit in each case, and the Board will continue to do so under this rule. Should the parties not agree on the appropriate unit, a hearing in each case will still be directed, with the Board ultimately rendering a decision on the appropriate unit applicable to that particular petition and that particular employer's operation. The Board may properly rely on a rule properly promulgated under the APA just as it has, since 1935, relied on rules formulated under adjudication.[7]

In response, petitioner has not contended—and indeed could not contend—that the Board can *never* employ its rulemaking power to elaborate the standard set forth in Section 9(b). Petitioner concedes that the Board would have authority to issue "rules establishing general principles to guide the required case-by-case bargaining unit determinations," including at least "regulations stating the factors regional directors should weigh in determining bargaining unit appropriateness" (Pet. Br. 19) and perhaps "rebuttable presumption[s] of fact" (*id.* at 21). Yet, without ever making clear just what limitation it finds in the words "in each case," petitioner maintains that the Board's regulation is too "rigid" in prescribing appropriate units.[8]

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[7] As the Board noted, a range of issues, such as whether an institution is an acute care hospital under the rule, will be subject to determination in each proceeding under Section 9(c). J.A. 215-216 n.2; note 14, *infra*.

[8] Most of petitioner's argument is structured around the dichotomy it perceives between "individual case-by-case determinations of bargaining units" and what it characterizes as "rigid," "in-

The Board's interpretation of Section 9(b) is fully justified by the language, structure, and legislative history of the statute, the Board's past practice, and decisions of this Court construing analogous statutes. Moreover, even if there were another reasonable interpretation, the Board's interpretation is at least "rational and consistent with the statute" and thus deserving of deference from this Court. *E.g.*, *NLRB* v. *United Food Workers Union, Local 23*, 484 U.S. 112, 123 (1987). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984). By contrast, petitioner's interpretation is untenable. The words "in each case" cannot reasonably be interpreted to prohibit the Board from concluding, on the basis of its study and experience, that variations among a discrete class of employers are not sufficient to require them to be treated differently in unit determination proceedings.

A. The "In Each Case" Language Does Not Limit the Board's Authority to Promulgate Regulations Applicable in Representation Proceedings

On their face, the words "in each case" refer to the proceeding in which the Board is to issue its bargaining unit determinations, and not to the nature of the rules or principles that may be brought to bear in those proceedings or to the evidence that may or must be considered. Thus, the directive to the Board to "decide [the scope of the appropriate unit] in each case" is most

flexible," or "set" rules (see, *e.g.*, Pet. Br. 11, 13, 14, 15, 17). The dichotomy is false; worse, it is a veiled invitation to engage in excessive review of administrative judgments. The application of rules in a particular case is a routine element of case-by-case adjudication. Rules are most effective in assuring the consistency and efficiency of adjudications when they provide as much certainty as the considerations underlying them justify. In the administrative context, agencies have primary responsibility for fashioning such rules; courts review the rules to determine whether they are within the scope of an agency's authority and whether they are arbitrary and capricious.

plausibly read simply to require the Board to render its bargaining unit determinations in each individual representation proceeding, employing whatever rules and procedures are otherwise proper. The statutory context—the provisions of the Act empowering the Board to issue rules and to make bargaining unit determinations—confirms that interpretation.

1. The NLRA charges the Board with "primary responsibility for developing and applying national labor policy." *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990). To that end, Section 6 of the Act, 29 U.S.C. 156, authorizes the Board "to make * * * such rules and regulations as may be necessary to carry out the provisions of [the Act]." That rulemaking authority includes the power to elaborate on the broad provisions of the NLRA. If the Board "is to accomplish the task which Congress set for it, [it] necessarily must have authority to formulate rules to fill the interstices of broad statutory provisions." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. at 501. In its adjudications, the Board has often announced, and this Court has upheld, rules of decision elaborating on the NLRA.[9] Unless the "in each case" language limits the Board's power in the context of bargaining unit determinations, the Board has equivalent authority to specify, as to particular classes of employers, what bargaining units will "assure to employees the fullest freedom in exercising the rights guaranteed [by the Act]." 29 U.S.C. 159(b).

Whether promulgated in adjudications or through rulemaking, rules adding specificity to the Act, and thus nar-

[9] *Charles D. Bonnano Linen Service, Inc.* v. *NLRB*, 454 U.S. 404 (1982); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Brooks* v. *NLRB*, 348 U.S. 96 (1954); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). See *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 290 n.12 (1972). As long as it complies with procedural requirements, the Board has discretion to employ either rulemaking or adjudications to add specificity to the Act. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *NLRB* v. *Wyman-Gordon Co.*, *supra*; cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

rowing the issues for adjudication, serve important statutory policies. Rules provide guidance to private parties, channel the exercise of the Board's discretion, and add efficiency and consistency to the Board's adjudications.[10] Those advantages of rulemaking have particular force in the context of bargaining unit determinations. Rules settling the scope of appropriate bargaining units allow employees to plan organizational campaigns to reach members of an appropriate bargaining unit and enable employers to determine whether they have a legitimate basis for opposing a request for recognition.[11] Conversely, litigation arising from uncertainty over appropriate bargaining units burdens the Board's processes, frustrates the exercise of rights protected by the Act, and encourages employers to use delaying tactics to diminish the union's support. See J.A. 52. Many courts and commentators—emphasizing the certainty and information-gathering advantages of rulemaking—have urged the Board to make greater use of its power to issue regulations in this area.[12]

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[10] See generally Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571, 587-598 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 929-942 (1965); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729, 734-735 (1961); Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 San Diego L. Rev. 9, 29-42 (1987). See also *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. at 777-778 (Douglas, J., dissenting); Scalia, *The Rule of Law As A Law Of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

[11] For this reason, some hospitals supported the concept of rulemaking before the Board, maintaining that "unit determinations in the industry were confused and hard to follow" and led to "protracted litigation." J.A. 51.

[12] See, *e.g.*, *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087, 1093-1094 (7th Cir. 1984); *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983); *Trustees of Boston Univ.* v. *NLRB*, 575 F.2d 301, 305 (1st Cir. 1978); J.A. 17-18 nn.33-35; Pet. App. 5a-6a. See also note 10, *supra*.

2. Section 9(b) cannot fairly be construed to subtract, by implication, from the Board's power to employ rulemaking to enhance the certainty, consistency, and efficiency of bargaining unit determinations. As this Court has noted, Section 9(b) provides the Board with "broad discretion" to determine appropriate bargaining units, *e.g.*, *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). In exercising that discretion, the Board is not required to apply the statutory standard to the facts of each case as if it were a case of first impression. Rather, the Board is free to articulate the basis for its decisions "by reference to other decisions or its general policies laid down in its rules and its annual reports, reflecting its 'cumulative experience.'" *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 n.6 (1965). "The mandate to decide 'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents." K. Davis, *Administrative Law Text* 145 (3d ed. 1972).

There is no inconsistency between the Act's grant of "wide discretion" to the Board, recognizing its "need for flexibility," *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944), and the adoption of rules applying to a particular category of employers.[13] As Judge Friendly noted in a much-quoted decision, there is no general principle "forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on

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[13] Contrary to petitioner's assertion (Pet. Br. 17), this Court has never indicated "that the statute required case-by-case determination of bargaining-unit appropriateness and precluded reliance on the kind of inflexible rules the Board has now issued." None of the cases cited for that proposition, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. at 134; *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 494 (1985); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947), called upon the Court to consider the extent of the Board's power to apply rules to bargaining unit determinations; thus, the Court expressed no position on that issue.

a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering." *Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970). So here, Congress wisely conferred on the Board broad discretion to frame bargaining units, but at the same time empowered the Board to adopt more specific rules narrowing its discretion when it determines that the members of a particular class or category are sufficiently alike to be treated alike.

3. The Board's interpretation—which recognizes its obligation to issue bargaining unit determinations in each individual representation proceeding and its authority to "rely on a rule properly promulgated under the APA" (J.A. 214) in making those determinations—is the most plausible reading of "in each case" and also affords full effect to the Board's authority under both Sections 6 and 9 of the Act. There is no merit to petitioner's suggestion (see Pet. Br. 19) that a larger role—and one that substantially impairs the Board's authority—must be found for the "in each case" language.

First, the Board's interpretation of the "in each case" language is consistent with the view of its drafters that it constituted a clarifying amendment (see pp. 21-23, *infra*). Petitioner's view, which would work a radical reduction of the Board's authority, far transcends clarification. Second, the "in each case" language does serve important functions under the Board's interpretation. It assures that the results of the application of the rule to the material facts will be expressed in a decision tailored to the individual case. The Board's interpretation also guarantees that the rule will be applied to the parties to a representation dispute in a proceeding in which they will have the opportunity, before the agency and upon judicial review, to raise questions as to how the rule applies to particular facts, to argue that the rule does not apply at all, and to raise questions unrelated to the rule.[14] The "in each case" language occupies a

[14] Such questions include, for example, not only whether there are "extraordinary circumstances," but also whether a contract bar

meaningful place in the statute; there is no warrant for reading it as a limit on the Board's use of rules of decision.[15]

B. The Board's Interpretation Is Consistent With the Legislative History of the "In Each Case" Language

The words "in each case" did not initially appear in the bill introduced by Senator Wagner from which the NLRA evolved.[16] The Senate Labor Committee inserted the phrase at the suggestion of Secretary of Labor Frances Perkins, whose explanation of the amendment was terse. She observed only that a number of amendments—of which "in each case" was just one—were "for the sake of clarity." 1 *1935 Leg. Hist.* 1332, 1442, 1445; 2 *id.* at 2757-2758. Likewise, the Senate committee that added the "in each case" language evidently did not con-

exists, whether a single- or multiple-facility unit is required, whether an institution is an "acute care hospital," whether particular employees are supervisors, whether given employees should be placed in a particular unit, how to treat an employee with "dual" functions, and whether a union's proposal for a combination of units is appropriate. See J.A. 123 n.23, 132, 149, 160, 186, 216 n.2, 225-226, 231, 243.

[15] Four of the five court of appeals decisions on which petitioner relies (Pet. Br. 17-18 n.6) held that Section 9(b) prohibits the Board from effectively delegating its obligation to determine bargaining units to state agencies. *Memorial Hosp.* v. *NLRB*, 545 F.2d 351 (3d Cir. 1976); *NLRB* v. *Cardox Div. of Chemetron Corp.*, 699 F.2d 148 (3d Cir. 1983); *Allegheny General Hosp.* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979); *Long Island College Hosp.* v. *NLRB*, 566 F.2d 833 (2d Cir. 1977), cert. denied, 435 U.S. 996 (1978). Cf. *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F.2d 167, 173-174 (4th Cir. 1959) (holding that Board had erred in effectively delegating authority to employees), cert. denied, 361 U.S. 943 (1960). The fifth upheld the Board's use of a rebuttable presumption; the court's observations as to the permissibility of an irrebuttable presumption were dicta. *Big Y Foods, Inc.* v. *NLRB*, 651 F.2d 40, 45-46 (1st Cir. 1981).

[16] S. 1958, 74th Cong., 1st Sess. (1935) (*reprinted in* 1 NLRB *Legislative History of the National Labor Relations Act of 1935*, at 1300 (1949) [hereinafter *1935 Leg. Hist.*]).

sider it important enough to warrant an explanation in the committee report. S. Rep. No. 573, 74th Cong., 1st Sess. 14 (1935), *reprinted in* 2 *1935 Leg. Hist.* 2313.

Consequently, the legislative history does not pinpoint the uncertainty that the Perkins amendment was calculated to eliminate.[17] The "in each case" language may be related to a suggestion advanced by John Frey, President of the Metal Trades Department of the American Federation of Labor, in testimony before the Senate Labor Committee in support of S. 1958. He proposed adding the words "in each instance" to Section 9(b) to make clear that "when a specific case comes to the Board, in the individual case the Board will decide which shall be the unit of representation * * *." 1 *1935 Leg. Hist.* 1583; see *id.* at 1334. This statement is consistent with the Board's interpretation.

Subsequent House committee reports included a similar statement that the "matter [of appropriate bargaining units] is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination." H.R. Rep. No. 969, 74th Cong., 1st Sess. 20 (1935) (*reprinted in* 2 *1935 Leg. Hist.* 2930); H.R. Rep. No. 972, 74th Cong., 1st Sess. 20 (1935) (*reprinted in* 2 *1935 Leg. Hist.* 2976); H.R. Rep. No. 1147, 74th Cong., 1st Sess. 22 (1935) (*reprinted in* 2 *1935 Leg. Hist.* 3072). While petitioner places great stress on these statements (Pet. Br. 14), they are not

[17] In assessing the significance of the Perkins amendment, it is important to recall that the Board's procedures for representation proceedings were novel and were not finally settled until, after the enactment of the Wagner Act, the Board issued a rule providing for the submission of representation petitions. See J. Rosenfarb, *The National Labor Policy and How it Works* 301, 303-304 (1940). Section 9(c) of the Wagner Act, ch. 372, 49 Stat. 453, was substantially amended in 1947; as enacted in 1935, it did not refer to representation petitions. In 1935, the addition of "in each case" to Section 9(b) could well have been regarded as a clarification of the fact that the Board would determine an appropriate bargaining unit in each case in which its processes were invoked.

at all inconsistent with the Board's position here. If the regulation at issue is upheld, the Board will continue to determine bargaining units by applying the regulation and considering all other issues "in each individual case." Nothing in the legislative history suggests that the amendment was to have the extraordinary effect of restricting the Board's authority to narrow and define the issues through adoption of rules.[18]

C. From Its Earliest Days, the Board Has Adopted Rules of Decision to Guide its Bargaining Unit Determinations

As petitioner notes (Pet. Br. 16), the regulation at issue is the product of the first rulemaking the Board has undertaken in this area. That is not to say, however, that the Board previously construed the statute to withhold authority to fashion rules to limit and structure its bargaining unit determinations. Indeed, from its inception, the Board has announced rules of decision narrowing the issues in particular categories of bargaining unit cases when, in its judgment, those categories have warranted that treatment.[19]

[18] Petitioner's reliance (Pet. Br. 15-16) on testimony by Francis Biddle to the effect that "[i]t is impossible to lay down a definite rule for the determination of the appropriate unit" (1 *1935 Leg. Hist.* 1459) is misplaced. Mr. Biddle was discussing the form of the *legislation* that *Congress* should draft, not the *rules* the *Board* might adopt. In this respect, Mr. Biddle's testimony was consistent with the statement by the "first NLRB" (an agency of which Mr. Biddle was the Chairman, operating under authority of an Executive Order for a brief period prior to the enactment of the Wagner Act) that the choice of a bargaining unit was "an administrative matter" (see Pet. Br. 15).

[19] Petitioner argues (Pet. Br. 16) that the Board, in its First Annual Report, "explained that Congress required [it] to determine the appropriate bargaining unit individually in each particular case and precluded adoption of rigid rules." What the Board actually said was:

> Experience has proven the wisdom of delegating to the Board the task of deciding in each case the unit appropriate for purposes of collective bargaining. The complexity of mod-

1. From the outset, it has been the Board's practice to supplement the statutory standard with its own, more specific, pronouncements. The First Annual Report outlined factors—nowhere mentioned in the statute—to which the Board referred in making bargaining unit determinations. NLRB, *First Ann. Rep.* 113 (1936). More specific rules were announced over time. In 1938, the Board reported that "[i]n a limited number of situations, the Board has found that it can formulate rules which apply in the absence of factors tending to make them inapplicable"; as an example, it cited a decision in which it had held that "clerical employees, engineers, and chemists are prima facie unsuitable for inclusion in a unit with production employees." NLRB, *Third Ann. Rep.* 159-160 (1938).

In 1945, the Board reported (*Tenth Ann. Rep.* 35 (1945)):

> In considering a large number of cases which are apparently symptomatic of the spread of union organization among white collar workers, the Board has developed certain additional rules which are generally applied, in the absence of persuasive reasons to the contrary: office clerical and technical workers are normally segregated from production and maintenance workers, and technical workers are usually segregated, in turn, from clerical employees if any interested party argues for their separation; but plant clericals who work in close contact with production workers and under the same supervision with them, are treated as part of the production and maintenance group.

See *Kroger Co.*, 204 N.L.R.B. 1055 (1973); *Westinghouse Elec. Corp.*, 118 N.L.R.B. 1043, 1047 & n.12 (1957).[20]

Other rules, like the regulation at issue, were formulated with reference to conditions in particular industries. For instance, in *E.H. Koester Bakery*, 136 N.L.R.B. 1006, 1009-1012 (1962), the Board noted that it assigned truck drivers in a few industries, where generalizations were possible, to a combined unit or to a separate unit on an industry-wide basis, but resolved their treatment in the remaining industries by reference to various factors. The Board has also evolved principles regarding the breadth of bargaining units in various industries. There is a presumption in favor of single-plant or single-outlet units in most industries, in favor of district-office units in the insurance industry, and in favor of systemwide units in the public utility and oceanic transport industries. 1 C. Morris, *The Developing*

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ern industry, transportation, and communication, and the numerous and diverse forms which organization among employees has taken, preclude the application of rigid rules to determine the unit appropriate in each case.

NLRB, *First Ann. Rep.* 112 (1936). As a reading of this passage shows, the Board was approving the breadth of discretion given it by Congress, and also indicating its own disapproval of "rigid rules." The Board was not acknowledging any *statutory* preclusion of its authority to adopt rules narrowing its own discretion when, in the Board's judgment, conditions justified that course.

The point was repeated in the Board's subsequent reports through 1942. A statement in that year's Seventh Annual Report did refer to the Board's "duty under the Act" to "decide[] each case on the basis of all the facts and circumstances involved." NLRB, *Seventh Ann. Rep.* 59 (1942). But this single statement in an annual report, whatever its intent, must be considered against the background, discussed in text, of the Board's frequent adoption of rules of decision narrowing and defining the scope of its discretion.

[20] In 1947, some of the Board's rules of decision—regarding professionals, supervisory personnel, and craft severance—were a major bone of contention in the debates leading to the enactment of the Taft-Hartley Act. Congress amended Section 9 to supply additional statutory standards for bargaining unit determinations in those areas. 29 U.S.C. 159(b)(1)-(3) and (c)(5). But Congress did not suggest that the Board should cease its efforts to formulate rules of decision. To the contrary, the Senate committee report observed that "[i]n view of the tremendous number of [unit determination] cases, * * * it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice." NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 416 (1948).

Labor Law 432-436 (2d ed. 1983). These examples of Board rules of decision are not exhaustive.[21]

2. Petitioner thus paints a misleading picture of the Board's past practice.[22] While the dominant feature of its bargaining unit determinations has been the "community of interest" approach, the Board has, from time to time, announced specific rules applicable to particular groups of employees or industries. The present regulation leaves less leeway for exceptions than many of the rules previously established, but their effect is much the same. A party seeking to establish the propriety of a unit combining clerical and production workers who fails to show "persuasive reasons" for that unit (pp. 24-25, *supra*) is in essentially the same position as an acute care hospital that is unable to demonstrate "extraordinary circumstances." Thus, the Board was fully justified in viewing the regulation at issue as a logical extension of its past practice of enunciating rules in bargaining unit cases. See J.A. 213-214.[23]

[21] See, *e.g.*, *Esco Corp.*, 298 N.L.R.B. No. 120 (June 20, 1990) (setting forth three conditions for separate retail warehouse unit).

[22] In *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411 (1980), the Board acquiesced in a decision by the Ninth Circuit holding that an "irrebuttable presumption" in favor of a separate nurses unit, based upon the record in a prior adjudication, was inconsistent with Section 9(b) and the 1974 admonition. See *NLRB* v. *St. Francis Hosp.*, 601 F.2d 404 (9th Cir. 1979). It is by no means clear that the Board would have considered the regulation at issue here, which is based upon a detailed rulemaking record and includes an exception for "extraordinary circumstances," as the equivalent of the "irrebuttable presumption" at issue in *Newton-Wellesley*. But in any event, the Board's present interpretation, which is based on an exhaustive consideration of new data, as well as on full discussion of relevant precedent, is entitled to deference. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 863-864; *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397, 416 (1967).

[23] In any event, "[a]uthority actually granted by Congress * * * cannot evaporate through lack of administrative exercise." *FTC* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941). See *United States* v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586, 590 (1957).

D. The Board's Interpretation Finds Further Support in Decisions of this Court Construing Analogous Statutory Schemes

The Board's view of its authority under Sections 6 and 9(b) is consistent with decisions of this Court addressing analogous statutory schemes. *Heckler* v. *Campbell*, 461 U.S. at 467; *FPC* v. *Texaco Inc.*, 377 U.S. 33, 41-44 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). See also *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 600-601 & n.44 (1981). In each of these cases, this Court rejected a contention that a statutory provision requiring an individualized determination limited an agency's broad grant of rulemaking authority.

In *Heckler* v. *Campbell*, for instance, a person claiming disability benefits—which were available upon a showing that the claimant was unable to engage in substantial gainful employment in the economy—argued that a provision entitling her to a hearing should be construed to prohibit HHS from adopting rules specifying the employment available for persons with various impairments. The Court rejected that contention, explaining (461 U.S. at 467 (citations omitted)):

> It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. * * * But this does not bar the Secretary from relying on rulemaking to resolve certain classes of issues. The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.[24]

[24] As the Court noted in *Heckler* v. *Campbell*, the affected party was permitted to show that the contested rule should not be ap-

The same reasoning is applicable here. Section 9(b)'s requirement that the Board issue its bargaining unit determinations "in each case" is functionally indistinguishable from the provisions that, in *Heckler* v. *Campbell*, required "individualized determinations based on evidence adduced at a hearing." Compare Pet. Br. 21. Petitioner mistakenly attempts (*id.* at 22-23) to distinguish *Heckler* v. *Campbell* on the basis that the regulations in that case addressed an issue "not unique to each claimant" (461 U.S. at 468). Here, the Board has determined that acute care hospitals are sufficiently alike to be treated alike—that variations among them do not present issues so unique to those hospitals as to require different treatment. J.A. 57-58, 189. Because the Board's rulemaking authority includes the power to determine which issues require individual treatment and which "may be established fairly and efficiently in a single rulemaking proceeding," a court may not displace that judgment unless it is beyond the scope of the Board's authority or is arbitrary and capricious.[25] Nothing in *Heckler* v. *Campbell* suggests otherwise.

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plied to her (461 U.S. at 467 & n.11). The "extraordinary circumstances" exception to the Board's regulation affords parties to representation proceedings a comparable opportunity. See J.A. 21, 186-190, 244-246. See also *FCC* v. *WNCN Listeners Guild*, 450 U.S. at 601 n.44 (suggesting that such a "safety valve" is not invariably necessary).

[25] See Pet. App. 16a ("The decision how much discretion to eliminate from the decisional process is itself a discretionary judgment, entitled to broad judicial deference.").

E. The Board's Regulation Is Consistent with Any Reasonable Interpretation of the "In Each Case" Language

For the reasons stated, the Board's interpretation of the "in each case" language is more than just "rational and consistent with the statute" (*NLRB* v. *United Food Workers Union, Local 23*, 484 U.S. at 123); it best accommodates the language, structure, and legislative history of the NLRA and other relevant materials. That interpretation should therefore be upheld by this Court.

Moreover, the regulation at issue does not operate to deprive acute care hospitals of meaningful consideration of facts *material* to the Board's bargaining unit determinations. Unless the Board is to be relegated to receiving whatever evidence a party wishes to offer, the Board must be allowed to define the issues material to its determinations and to exclude evidence on issues that cannot affect its judgments. See *FPC* v. *Texaco Inc.*, 377 U.S. at 44; *Fook Hong Mak* v. *INS*, 435 F.2d 728 (2d Cir. 1970).

Significantly, although petitioner never alludes to it, the Board and the courts have consistently held that Section 9(b) requires the Board only to designate *an* appropriate unit, not the most appropriate unit.[26] Thus, a regulation that is based on the Board's assessment of conditions in a discrete sector of an industry, that adds efficiency and consistency to the Board's decisions, and that facilitates the exercise of protected rights may not be

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[26] See, *e.g.*, *Morand Brothers Beverage Co.*, 91 N.L.R.B. 409, 417-418 (1950), enforced on other grounds, 190 F.2d 576 (7th Cir. 1951); *Trustees of Masonic Hall & Asylum Fund* v. *NLRB*, 699 F.2d 626, 634 (2d Cir. 1983); *State Farm Mutual Auto Ins. Co.* v. *NLRB*, 411 F.2d 356, 358 (7th Cir.) (en banc), cert. denied, 396 U.S. 832 (1969); *Friendly Ice Cream Corp.* v. *NLRB*, 705 F.2d 570, 574-575 (1st Cir. 1983); *Local 627, Operating Engineers* v. *NLRB*, 595 F.2d 844, 848-849 (D.C. Cir. 1979); *NLRB* v. *Western & Southern Life Ins. Co.*, 391 F.2d 119, 123 (3d Cir. 1968), cert. denied, 393 U.S. 978 (1969).

rejected by a court because it excludes consideration of particular facts tending to show that some configuration other than that specified in the rule might be "better" in the particular case.[27]

The regulation at issue here represents the Board's "considered judgment * * * that acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units" (J.A. 188-189; see J.A. 57-58) and, accordingly, that "the issue of the scope of the appropriate unit within an acute care hospital does not generally require adjudicatory consideration" (J.A. 216 n.2). Consistent with this judgment, the regulation does not permit an acute care hospital to relitigate, in an individual proceeding, the Board's decision that certain facts will not result in a decision that a unit is inappropriate. Rather, the claimant is limited to presenting evidence on facts that are potentially material, a limitation that includes an opportunity to show "extraordinary circumstances" warranting a departure from the regulation (J.A. 215-216 n.2, 244-246; note 14, *supra*).[28]

[27] For that reason, petitioner is misguided in suggesting that the effect of the regulation at issue is to impose a bargaining unit on the parties "even when the facts are to the contrary" (Pet. Br. 21). Here, the Board has determined that—absent extraordinary circumstances—the facts that might be offered to contradict the units prescribed by the regulation would not show that a prescribed unit was other than *an* appropriate unit. This action involves a *facial* challenge, see *Bowen* v. *Yuckert*, 482 U.S. 137, 154 & n.12 (1987), but petitioner makes no effort to demonstrate that, on its face, the regulation fails to produce units that "assure to employees the fullest freedom in exercising [their] rights." 29 U.S.C. 159(b).

[28] The exception is not, as petitioner contends (Pet. Br. 20), "illusory." It may not be employed to relitigate issues—such as the size of a given institution, the services it offers, certain staffing patterns, and a variety of other circumstances (J.A. 187-188, 246)—that were determined in the rulemaking to be immaterial. But the exception applies when application of the rule would yield a unit of five or fewer employees and "remains available * * * for any party who wishes to argue for any reason that the rule should not be applicable to its facility" (J.A. 231 n.5). A party is free to make an offer of proof to preserve a claim that particular circumstances would make it unjust to apply the regulation. J.A. 190.

II. THE BOARD'S RULE IS CONSISTENT WITH THE 1974 AMENDMENTS TO THE NLRA

Petitioner places great reliance on the admonition in the 1974 committee reports. But evidently recognizing the difficulty it faces in deriving a legal obligation from a statement in committee reports, petitioner attempts to merge the question whether the regulation violates the "in each case" language with the separate question whether the regulation violates the admonition. Petitioner argues, for instance, that the admonition "confirm[s]," "underscore[s]," or "reaffirm[s]" petitioner's interpretation of Section 9(b). Pet. Br. 26, 30. The admonition is immaterial to this case, however, unless it can be shown to have meaning beyond the "in each case" language. Congress passed the "in each case" language in 1935 and has not amended it since. If petitioner is entitled to prevail under that language, the question of the effect of the admonition need not be reached. Conversely, if the 1935 statute does not prohibit the Board's regulation, the admonition is irrelevant unless it can be shown to have added a limitation on the Board's statutory authority that was not there before, that is unique to the health care industry, and that invalidates this regulation.

In its Final Rule, the Board observed that it was "inclined to agree" with the majority in *International Bhd. of Elec. Workers* v. *NLRB*, 814 F.2d 697 (D.C. Cir. 1987), that the admonition did not give rise to a legal obligation. That inclination is fully justified. The admonition did not accompany an amendment of Section 9(b) and thus cannot be read to clarify the meaning of a law passed by Congress and signed by the President. But in any event, the Board regarded the admonition as an expression of the sense of Congress regarding proliferation and undertook to comply with it. The Board made clear that it was "mindful of avoiding undue proliferation, not

only because this desire was expressed in the legislative history, but also because it accords with [the Board's] own view of what is appropriate in the health care industry." J.A. 66; see J.A. 25-26.

A. In the Rulemaking, the Board Gave Due Consideration to Preventing Proliferation of Bargaining Units

In order to obtain the information it wanted on the issue of proliferation, the Board, in its first notice of proposed rulemaking, solicited answers to specific questions on the potential evils of proliferation and stressed its desire for "actual, empirical, practical evidence" on those questions. J.A. 20. With the benefit of data assembled during the rulemaking, the Board also explained why each of the units prescribed by the regulation—and the scheme as a whole—would not contribute to those evils or otherwise violate the admonition. J.A. 95-96, 110-113, 114, 120, 131, 140-144, 145-146, 158-159, 191-194, 246-254. See also J.A. 78-84 (explaining why the industry's two-units-plus-guards proposal would not be preferable to the Board's approach).

With respect to particular units, the Board cited evidence that those units would not, in practice, encourage strikes, wage whipsawing, jurisdictional disputes, or leapfrogging. For instance, the Board found that with respect to nurses, the fact that "RNs are in a different labor market mitigates against [wage] leapfrogging." J.A. 86. While acknowledging that registered-nurse units had engaged in strikes, the Board observed that nurses would generally predominate in strike votes in all-professional units, posing the risk that strikes in such units would be more serious. J.A. 110. Similarly, the Board noted, strikes involving technical workers alone were rare (J.A. 131), and the record contained no evidence that separate units of office clericals led to sympathy strikes, jurisdictional disputes, or wage leapfrogging (J.A. 158). See J.A. 141-144 (similar findings as to separate unit of skilled maintenance workers).

In the course of analyzing the industry's support for a rule prescribing three units—covering professionals, nonprofessionals, and guards—the Board cited statistics showing that organization of one unit in a hospital did not promote organization of other units (J.A. 79; see J.A. 193); that a large majority of all hospitals negotiated not more than three collective bargaining agreements (J.A. 79); that strikes were rare in the industry (J.A. 80-81); and that either there was no correlation between the number of units in a hospital and the frequency of strikes or the likelihood of strikes *decreased* as the number of units increased (J.A. 81-82). The Board found no evidence that multiple units contributed to jurisdictional disputes, leapfrogging, or whipsawing. J.A. 82-84. See J.A. 193-194, 251.[29] The Board concluded (J.A. 191):

> A thorough examination of the record in this rulemaking proceeding has satisfied us that the health care units established by the Board do not constitute proliferation either in terms of the legislative history of the amendments or in the context of the history or realities of the industry.

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[29] Petitioner complains that the Board's information was defective because it was not based on experience with "a proliferation of units" (Pet. Br. 38). However, the empirical data amassed during the rulemaking—data based upon experience with proprietary hospitals, units certified by the Board, and state-certified units—provided a legitimate source of information on the proposed rule. See J.A. 252. Petitioner makes no effort to show that the evidence was insufficient to sustain the Board's conclusions under applicable legal standards. See *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978) ("complete factual support in the record for the [agency's] judgment or prediction is neither possible nor required").

Moreover, having heard hospital bargaining-unit cases for nearly 15 years, the Board was justified in concluding that additional adjudications would not produce superior information. In those adjudicatory proceedings, the Board's information is limited by the resources and interests of the parties.

Petitioner's assertion that the Board's effort was an illegitimate attempt "to redetermine legislative facts already determined by Congress" (Pet. Br. 38) is without merit. The purpose of a delegation to an administrative agency is to assure—when Congress has been unable or unwilling to act definitively on an issue—that the agency will use its authority to gather information and employ its expertise in fashioning a response. Recognizing that Congress did not wish the question of proliferation to be resolved "in the abstract" (J.A. 253), the Board undertook "to carefully examine the exhaustive rulemaking record furnished by numerous parties from all sectors of the health care industry, and then to make a determination on appropriate units consistent with that evidence, consistent with [the Board's] self-expressed desire to avoid a proliferation of units, and consistent with a requirement that these units not be likely to produce the unwanted results of repeated work stoppages, jurisdictional disputes, wage whipsawing, and other related evils." (J.A. 253). When the Board completed that task, it had given "[d]ue consideration" to the issue of proliferation.[30]

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[30] Petitioner is mistaken in its assertion (Pet. Br. 35-36) that the regulation is inconsistent with the admonition's references to Board decisions. The admonition approved the holdings of two cases; petitioner misstates them both. In *Four Seasons Nursing Center*, 208 N.L.R.B. 403 (1974), the Board did not reject "a separate unit of skilled maintenance workers" (Pet. Br. 35) that would be approved under the regulation. The unit consisted of *unskilled* maintenance workers, who would be combined with service workers under the regulation (see J.A. 253 n.33); further, because the unit was in a nursing home and consisted of fewer than 5 employees, the regulation would not be applicable at all. In *Woodland Park Hosp.*, 205 N.L.R.B. 888 (1973), the only issue before the Board was whether x-ray technicians were entitled to a separate unit; the Board held, as the regulation would require, that no separate unit was appropriate. (Petitioner (Pet. Br. 36) overlooks the fact that the petitioning union did not challenge the Regional Director's decision that separate units of clericals, technicals, and other nonprofessionals were not appropriate, 205 N.L.R.B. at 888 n.3; the Board had no occasion to consider that issue.) Finally, since the admonition expressed only qualified approval of *Extendicare of West Virginia, Inc.*, 203 N.L.R.B. 1232 (1973), its holdings are an inappropriate benchmark against which to measure the regulation. See also note 47, *infra*.

B. The Regulation Is Consistent with the "Legislative History" of the Admonition

1. On its face, the admonition does not suggest any limitation on the Board's rulemaking authority. Undaunted, petitioner reviews the legislative history of the admonition and concludes that the admonition "reaffirmed the need for case-by-case unit determinations and underscored Section 9(b)'s requirement that the Board determine the appropriate unit 'in each case'" (Pet. Br. 30). Even on the heroic assumption that the legislative history of legislative history should be given significant weight, the materials cited in support of this proposition —which consist, in their entirety, of remarks by Senators Taft and Williams on the floor of the Senate and excerpts from testimony by Undersecretary of Labor Schubert during a committee hearing—say no such thing.[31] Those

[31] *1974 Leg. Hist.* 113-114 (remarks of Sen. Taft) (quoted at Pet. Br. 28-29); *id.* at 362-363 (remarks of Sen. Williams) (quoted at Pet. Br. 29 n.13); *Coverage of Nonprofit Hospitals Under National Labor Relations Act: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 427, 434 (1973) [hereinafter *1973 Senate Hearings*].

It is a useful exercise to compare these materials to petitioner's inflated claims as to Congress's intent. For instance, Senator Taft's remarks did not suggest, as petitioner asserts (Pet. Br. 27), that the Taft bill "was opposed as overly rigid and unduly restrictive of the Board's flexibility to determine bargaining units on a case-by-case basis taking into account the particular situation at each hospital." Rather, he simply reported that his approach "was not adopted by the committee," referred to the admonition, and opined that the Board "should be permitted some flexibility in unit determination cases." (The relevant passage is quoted at Pet. Br. 28-29.) There is no support whatever for petitioner's assertion that the admonition was intended to deny the Board the option of addressing proliferation through rulemaking—*i.e.*, to "requir[e] that the Board, in carrying out its required case-by-case determinations"

statements include no discussion whatever of the relative merits of rulemaking and adjudication or the limits on either, no mention of Section 9(b), and only the vaguest indications as to how the speakers expected the Board to proceed. Even at the level of generalities, the protagonists in the committee that drafted the admonition, Chairman Williams and Senator Taft, presented divergent explanations of its meaning.[32]

2. The Board's view of the significance of the admonition is fully justified. In 1972, the House passed a bill, H.R. 11357, 92d Cong., 2d Sess., that would simply have deleted the NLRA exemption for nonprofit hospitals. See 118 Cong. Rec. 27,128-27,136 (1972). In the Senate, the hospital industry, led by petitioner, sought to preserve the exemption. In hearings before a Senate committee, a representative of petitioner testified that the Act was "inappropriate for application[] to the health care field" for two reasons: "The first involves strikes, picketing, and impasses. The second pertains to the fragmentation and proliferation of bargaining units."[33] Alluding to decisions involving proprietary hospitals in which the Board had permitted separate units for some discrete professional and nonprofessional groups,[34] AHA asserted that "[a]dditional bargaining units can be pro-

(Pet. Br. 28), to consider proliferation only in each individual adjudication.

[32] Compare *1974 Leg. Hist.* 113-114 (remarks of Sen. Taft) with *id.* at 362-363 (remarks of Sen. Williams). See also *id.* at 361-362 (remarks of Senator Williams).

[33] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1972: Hearings on H.R. 11357 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 33 (1972) (testimony of David Hitt) [hereinafter *1972 Senate Hearings*].

[34] See, *e.g.*, *Syosset General Hospital*, 190 N.L.R.B. 304 (1971) (pharmacists); *Ochsner Clinic*, 196 N.L.R.B. 10 (1972) (radiologic technologists); *Birnbaum*, 178 N.L.R.B. 478 (1969) (licensed practical nurses).

jected for many other professional and paraprofessional groups as well as for the many crafts which are vital to the functioning of health care institutions such as engineers, carpenters, plumbers, electricians, and maintenance workers." *1972 Senate Hearings* 35. Other witnesses from the hospital industry echoed petitioner's warning of the possibility of highly fragmented bargaining units along craft lines.[35] No bill was reported to the Senate floor.

The following year, when the industry proved unable to defeat repeal of the exemption altogether, petitioner supported legislation that would, *inter alia*, prescribe five bargaining units in health care facilities. See *1973 Senate Hearings* 147-148. That proposal was incorporated in a bill introduced by Senator Taft. S. 2292, 93d Cong., 1st Sess. (1973) (*reprinted in 1974 Leg. Hist.* 449, 457-458). The Taft bill encountered opposition and was abandoned in favor of a compromise bill. The compromise bill contained some provisions addressing strikes and picketing, but simply extended Section 9(b) to the health care industry; as part of the compromise, the admonition was included in the committee reports.[36] See pp. 3-4, *supra*.

[35] See *1972 Senate Hearings* 158, 238-239, 300-301. The industry's concern with highly fragmented units was reiterated during hearings the following year. *1973 Senate Hearings* 128-129, 139-140, 160-161, 175, 181, 198-200, 273-274, 443, 465-466. But Congress received no testimony manifesting specific concern as to the units prescribed by the Board's regulation. Thus, when Senator Taft referred to the admonition on the Senate floor, he joined with the industry in decrying the results of permitting "each professional interest and job classification * * * to form a separate bargaining unit" and in arguing that health-care institutions "must not be permitted to go the way of other industries, particularly the construction trades, in this regard." *1974 Leg. Hist.* 113, 114.

[36] Industry representatives generally supported the Taft approach to bargaining unit determination, see *1973 Senate Hearings* 129, 181, 188; union representatives opposed it, see *id.* at 49, 59-60; and the Labor Department considered the provision unnecessary, *id.* at 434.

This history strongly supports the Board's understanding of the significance of the admonition—that "Congressional and industry concern with proliferation was directed towards the fifteen to twenty plus units that had arisen in the health care and other industries prior to the amendments and the possibility of scores of units if each hospital classification were permitted to organize separately" (J.A. 191) and that the Board was to exercise informed discretion in resolving the issue (J.A. 253). The Board has never suggested that "Congress would be satisfied with any number [of units] less than 15" (Pet. Br. 35); to the contrary, recognizing that the admonition reflected concern with avoiding strikes, jurisdictional disputes, and wage whipsawing, the Board undertook a detailed study of whether the units it had selected would engender those evils and concluded they would not.[37] Petitioner tried and failed to achieve passage of a bill that would have provided for five units in every health care facility; its opposition to the Board's present regulation, which permits a maximum of eight units in acute care hospitals, is an attempt to win in this Court what it was unable to obtain in Congress.[38]

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[37] As petitioner notes, various courts of appeals held that Board decisions in bargaining unit determinations were inconsistent with the admonition. See notes 3-4, *supra*. However, for the most part, those decisions faulted the Board for failing adequately to consider whether its decision was consistent with the admonition. The regulation is not subject to that criticism; for that reason, the Seventh Circuit did not regard its decision in *Mary Thompson Hosp. Inc.* v. *NLRB*, 621 F.2d 858 (1970), to foreclose the regulation.

[38] Petitioner's assertion (Pet. Br. n.18) that the admonition was a compromise between "those who favored repeal of the hospital exemption and those who opposed repeal" ignores Senator Taft's acknowledgment, when he introduced his 5-unit proposal, that the question whether the Act should be extended to nonprofit hospitals was no longer in issue. *1973 Senate Hearings* 75.

III. THE REGULATION IS NOT ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION

In determining whether agency action is arbitrary or capricious, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Marsh* v. *Oregon Natural Resources Council*, 109 S. Ct. 1851, 1861 (1989). Accord *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Moreover, where an agency is analyzing facts or making predictions within its area of expertise, review is at its most deferential. See *Marsh* v. *Oregon Natural Resources Council*, 109 S. Ct. 1860-1861; *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. at 813-814. See also *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Judged under these standards, the Board's regulation should be upheld. Indeed, the Board's painstaking evaluation and analysis of the data submitted, and its detailed explanation of the basis of its action, would withstand challenge under a far more rigorous standard of review.

Petitioner contends that the Board's regulation is arbitrary and capricious in "ignor[ing] critical differences among the more than 4,000 acute care hospitals in the United States, including differences in size, location, operations, and workforce organization." Pet. Br. 39.[39]

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[39] Petitioner also argues (Pet. Br. 38, 40) that the regulation is unsupported by substantial evidence within the meaning of 5 U.S.C. 706(2)(E). However, the substantial evidence standard applies only to "a case subject to sections 556 and 557 of [Title 5] or otherwise reviewed on the record of an agency hearing provided by statute," *ibid.*, and not to "regulations promulgated after informal

This is simply not so. The regulation does not ignore variations in the health care industry that are material to bargaining unit determinations. Rather, the Board acknowledged those variations among health care facilities that warranted modification of the regulation. Thus, the regulation was amended to exclude certain categories of facilities that the Board's original proposal would have covered—nursing homes, psychiatric hospitals, rehabilitation hospitals, and drug treatment facilities. With respect to the remaining category (acute care hospitals), the Board distinguished between those variations that may be material to the selection and definition of an appropriate unit—which will be litigated under the "extraordinary circumstances" exception and in other specific contexts (see J.A. 123 n.23, 149, 160, 216 n.2, 225-226)—and variations that the rulemaking and the Board's experience demonstrated are not material. The Board's "considered judgment * * * that acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units" (J.A. 188-189) is fully supported by its experience and by the administrative record.

A. The Regulation Is Not Arbitrary or Capricious By Virtue of Inconsistency with Other Board Actions

Petitioner's principal contention (Pet. Br. 40-41, 43-45 & nn. 27-29) is that the regulation represents an unexplained and unjustified departure from the Board's observation in a footnote in *St. Francis Hosp.*, 271 N.L.R.B. 948, 953 n.39 (1984) (*St. Francis II*), remanded *sub nom. International Bhd. of Elec. Workers* v. *NLRB*, 814 F.2d 697 (D.C. Cir. 1987), and from subsequent decisions by the Board's Regional Directors. Even taken at face value, that argument does not provide a sufficient basis for invalidating the regulation. A rule that is otherwise justified by an agency's experience and

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rulemaking," *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. at 802-803.

a voluminous rulemaking record is not arbitrary and capricious because it contradicts a footnote in an agency decision or rulings by subordinate agency officials. What is more, petitioner's contention is untenable even on its own terms. Petitioner asserts inconsistencies that do not exist, and fails to acknowledge the Board's full explanation of the approach embodied in the regulation.

1. Although petitioner's partial quotation (Pet. Br. 40) is calculated to obscure the point, *St. Francis II* did not say that generalizations regarding appropriate bargaining units in acute care hospitals were never possible. The Board said in *St. Francis* (271 N.L.R.B. at 953 n.39 (emphasis added)):

> The diverse nature of today's health care industry—*including nursing homes, small hospitals, large medical centers, blood banks, outpatient clinics, etc.*—precludes any generalization as to the appropriateness of any particular bargaining unit. However, despite these diversities, the disparity-of-interests test can and will be applied to all these facilities. *We anticipate that after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.*

This observation is consistent with the Board's regulation. First, the diversity to which the Board referred was principally among different types of health care facilities. The Board's regulation does not apply to many of those facilities, such as nursing homes, blood banks, and outpatient clinics. Second, the Board foresaw that "recurring factual patterns" among care facilities would permit identification of "typically appropriate" units. The rulemaking served to identify those areas in which generalizations regarding bargaining units were possible and, on that basis, specified apropriate bargaining units.

2. *St. Francis II* was a significant decision, but not in the sense petitioner suggests. Before that decision, the Board had employed its traditional "community of in-

terest" approach to determine appropriate bargaining units in health care facilities. See pp. 4-5, *supra*. In *St. Francis II*, however, the Board reexamined a prior decision in which it had found a separate maintenance unit appropriate and adopted the disparity of interests test advocated by the Ninth and Tenth Circuits.[40] Applying that test, the Board reversed its earlier finding that a separate maintenance unit was appropriate.

Although *St. Francis II* was vacated by the D.C. Circuit on the ground that the Board had accorded too much significance to the admonition, upon remand the Board reasserted its adherence to the disparity of interests test, this time in the exercise of its discretion, and reaffirmed its holding that a separate maintenance unit was not appropriate. *St. Francis Hosp.*, 286 N.L.R.B. 1305 (1987); see *St. Vincent Hosp. & Health Center*, 285 N.L.R.B. 365 (1987) (holding that a separate unit of registered nurses was not appropriate). Thereafter, while the rulemaking was underway, the Board continued to apply that standard. J.A. 180-183. Thus, when regional directors were called upon to determine the appropriateness of separate units of nurses, maintenance workers, and other categories of employees after *St. Francis II*, they rendered decisions consistent with the holdings of that case and *St. Vincent*. Petitioner cites some of those cases. Pet. Br. 44 nn. 27-28.[41]

The Board acknowledged that there was inconsistency in its decisions regarding certain of the units prescribed in the regulation, but explained why the regulation was nonetheless appropriate. See J.A. 5-8, 55-56, 64, 115-116

[40] See note 4, *supra*; J.A. 63. *St. Francis II* reversed the Board's decision in *St. Francis Hosp.*, 265 N.L.R.B. 1025 (1982).

[41] In two of the Regional Directors' decisions, *Wilmington Medical Center*, No. 4-RC-14780 (NLRB Reg. 4, Apr. 19, 1985) and *St. Joseph Hosp.*, 4-RC-14543 (NLRB Reg. 4, Dec. 24, 1984) (Pet. Br. 44 n.28), the Regional Director initially found separate maintenance units appropriate and reversed those decisions after remand from the Board based on *St. Francis II*.

& n.22, 146-147. First, on the basis of an analysis of the results of its cases, it found that doctrinal formulations—and not the facts of individual cases—had given rise to the divergence in its decisions (J.A. 55):

> Our adjudicatory decisions as to appropriate units in the health care industry, where the facts of each case were painstakingly examined in numerous lengthy and costly representation proceedings, have been remarkably uniform in results, varying only when the Board changed doctrinal formulations, e.g., from "community" to "disparity" of interests.[42]

Accordingly, the Board concluded that it would be "unproductive, especially considering the lack of universal judicial approval of any single doctrinal approach," to continue to scrutinize the facts of each individual case. J.A. 56. Instead, the Board undertook an exhaustive empirical study of the factors deemed relevant under both the community of interest and disparity of interests tests in fashioning appropriate units in the rulemaking (J.A. 67-68).[43]

Second, the Board noted that the information obtained during the rulemaking had cast doubt on the Board's disparity of interests decisions. With respect to nurses, the Board observed that, in the aftermath of *St. Francis II*, "RNs consistently desired separate RN units but were compelled to organize into all-professional units in order

[42] The Board found that from 1975 through 1984, the period during which the Board applied the community of interest test to the facts of each case, the Board "found RN units appropriate in 24 of 25 published cases [the one exception involving a psychiatric hospital outside the scope of the Board's rule]; technical units appropriate in 18 out of 18 cases; business office clerical units appropriate in 8 out of 8 cases; etc." J.A. 56.

[43] Those factors included, among others (J.A. 67-68):

> uniqueness of function; training; education and licensing; wages, hours and working conditions; supervision; employee interaction; and factors relating to collective bargaining, such as bargaining history, matters of special concern, etc.

to avoid prolonged litigation"; the organizing drives directed to all-professional units "were quite similar to prior nurses-only campaigns"; and "non-nursing professionals did not wish to be included in a unit with RNs," threatening the cohesiveness of the unit. J.A. 115-116. The Board noted that "were [it] to apply the empirical evidence presented in these hearings, we might well reach a different result in *St. Vincent*." J.A. 115 n.22. The Board also took care to explain the divergence between the regulation and certain decisions addressing other units. J.A. 146-147 (skilled maintenance unit); J.A. 159-160 (office clerical unit). As the Board noted, the units prescribed by the rule were consistent with virtually all of its decisions prior to its adoption of the disparity of interests test.[44]

There was no deficiency in the Board's explanation of how the regulation related to conflicting lines of authority in its prior adjudications. To the contrary, the Board acknowledged the divergence in its prior decisions, located the source, and fashioned an entirely reasonable response consistent with many of those decisions.[45]

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[44] The validity of the regulation is not undermined by the fact that it yields bargaining units that are frequently requested by unions and that have often been adopted by the Board. It is to be expected that the units found to guarantee effective representation for employees will correspond to the homogenous groups that have sought to organize themselves; that result affords employees a genuine opportunity to bargain—an opportunity Congress found would improve the delivery of health care in the United States. *Beth Israel Hosp.* v. *NLRB*, 437 U.S. at 499-500.

Ironically, petitioner suggests that the regulation is arbitrary and capricious *both* because it is inconsistent with the results of some of the Board's post-1984 cases (Pet. Br. 40-42) and because it is consistent with virtually all of the pre-1984 cases (*id.* at 46-47).

[45] In *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 42, this Court noted that when an agency alters its policies, it is "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." The Board provided just such an analysis in the explanatory statements it issued in the course of the rulemaking. The Board has "responsibility to adapt the [NLRA] to changing patterns of industrial life," taking account of "its cumulative experience in dealing with labor-management relations." *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266 (1975); see also *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

3. Finally, the results of many of the cases on which petitioner relies are not inconsistent with the regulation. For instance, *Jewish Hosp. & Rehabilitation Center*, No. 22-RC-9442 (NLRB Reg. 22, Aug. 27, 1985) (Pet. Br. 44 n.27), involved a rehabilitation center and nursing home that is beyond the scope of the regulation. J.A. 261; see J.A. 165-176, 236-240. In three other decisions cited by petitioner, the unions sought broad wall-to-wall or all non-professional units.[46] Under the regulation, a union has the

[46] *Titusville Hosp.*, No. 6-RC-973 (NLRB Reg. 6, July 30, 1986), slip op. 2-3 (see Pet. Br. 44 n.27) (employer sought, and union opposed, decertification of professionals from wall-to-wall unit certified b ystate board prior to 1974); *Twin City Hosp. Corp.*, Nos. 8-RC-13686 & 8-RC-13687 (NLRB Reg. 8, Nov. 10, 1987), slip op. 2 (see Pet. Br. 44 n.27) (union sought and employer did not oppose broad nonprofessional unit); *Santa Rosa Hosp.*, No. 20-RC-15845 (NLRB Reg. 20, June 7, 1985) (Pet. Br. 45 n.29) (union sought unit of all nonprofessional employees). Further, the cited passage in *Twin City Hosp. Corp.*, slip op. 6, focused on the *unit placement* question whether medical technologists should be classified as professional or non-professional employees; the regulation specifically reserves that issue for resolution in individual adjudications. J.A. 131-132, 243-244.

Finally, *Santa Rosa Hosp.* is a striking illustration of the Board's observation (J.A. 52-53) that litigation of factual issues in unit determinations often serves only to delay the holding of an election. In *Santa Rosa*, the union sought a broad non-professional unit, in keeping with petitioner's position here. Nevertheless, the employer argued "that there are disparities of interest among the various categories of employees sought by the petition, without stating a position as to which, if any, of the disparities are of critical significance." Slip op. 2. As a result, the regional director was compelled to examine "the specifics of the various categories * * * which may or may not be disputed." *Ibid.*

option of seeking to represent "various combinations of units." J.A. 260; see J.A. 185-186.

B. The Board's Conclusion that, Absent Extraordinary Circumstances, Differences Among Acute Care Hospitals Are Not Material to the Appropriateness of Bargaining Units Was Carefully Explained and Fully Justified

Petitioner also asserts (Pet. Br. 42) that the Board "offered no reason why evidence of differences among hospitals did not undercut its finding that 'there are such similarities that certain institutions may properly be grouped as a class'" and that the Board "blithely disregarded hundreds of letters submitted by hospitals detailing their size and workforce structure and the effect that the rule would have on their institutions." The record establishes otherwise.

1. The Board specifically addressed the industry's claim that variations among hospitals and developments in the health care industry precluded adoption of a regulation prescribing bargaining units in the absence of extraordinary circumstances. J.A. 49-60. It conscientiously summarized comments on both sides of that issue (J.A. 49-51, 52-55) and explained why it believed a regulation to be appropriate. That explanation took two forms. First, focusing on the variations themselves, the Board noted that diversity among hospitals had not theretofore affected the results of bargaining unit adjudications and that neither financial constraints nor diversification of institutions occurring within the industry made rulemaking any less appropriate. J.A. 55-59.

Second, in justifying the individual bargaining units prescribed by the regulation, the Board cited factors supporting generalizations as to the appropriateness of those units. For instance, with respect to nurses, the Board found that, despite various systems of organization, the director of nurses invariably has supervision of RNs (J.A. 93-94); that RN licensing exams are uniform

throughout the country (J.A. 97); and that "licensing and other regulations" preclude interchange of work and cross-training between RNs and other professionals (J.A. 98, 101). The Board's discussion of each of the prescribed units discloses the generalizations on which the unit was based and the experience or record evidence underlying those generalizations. See J.A. 91-161, 224-229.

Petitioner fails to come to terms with the Board's explanation. For instance, it characterizes the Board's supposed failure to explain why technical employees and skilled maintenance employees were not included in a single unit as "[p]erhaps the most telling example" (Pet. Br. 45) of the regulation's shortcomings. The Board's detailed explanation of why these categories of employees should be separated from the service and maintenance unit prescribed by the regulation, however, leaves no doubt why those categories differ from one another. See J.A. 122-161. For example, the Board noted that the wages and hours of technical employees differ significantly from those of other non-professionals; that there is a sizeable and widening gap between the level of skills required of technicals and that required of other non-professionals; that there is no temporary interchange and little permanent interchange between the two groups; and that technical employees have separate career paths and labor markets. J.A. 123-129.[47]

2. Petitioner's so-called "representative sample" of comments from hospitals (Pet. Br. 42 n.24) does not undermine the Board's conclusions. Far from "detailing [the hospitals'] size and workforce structure" (*id.* at

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[47] In *Extendicare of West Virginia, Inc.*, 203 N.L.R.B. 1232 (1973), the union requested three separate units: licensed practical nurses, technical employees, and all other service and maintenance personnel. The Board's decision permitted two units: LPNs and all other service and maintenance personnel. Given a similar union request, the regulation would also provide for two units: technical employees and all other service and maintenance personnel (including LPNs).

42), the cited letters were, in the main, one- or two-page statements of opposition to the regulation unaccompanied by the "actual, empirical, practical evidence" (J.A. 20) that the Board requested. Moreover, the regulation actually accommodates many of the concerns addressed in the letters petitioner cites—presumably, the most favorable to its position that an undoubtedly diligent search of the voluminous record managed to turn up.[48]

[48] Citing the one-page comment of Marshalltown Medical & Surgical Center (Ct. App. Supp. App. 370), petitioner asserts that hospitals have utilized cross-training that cuts across the units determined in the regulation. The one example given by Marshalltown was security guards who work the switchboard and do maintenance work; security guards, by statute (see 29 U.S.C. 159(b)(3)), cannot be included in more comprehensive units. See J.A. 225 (addressing this comment). The comment of Michael Reese Hospital (Ct. App. Supp. App. 375-377) detailed its experience with three separate units—which the hospital had voluntarily recognized—of electricians, operating engineers, and firemen and oilers. The regulation would require all those employees to be included in one skilled maintenance unit. This comment also noted that skilled maintenance personnel move throughout the hospital performing their jobs (see Pet. Br. 44); the Board explained (J.A. 136) why that situation did not render inappropriate a separate skilled maintenance unit. The complaints in this comment about seniority and mobility were attributable to the particular terms of the collective agreements the hospital agreed to; they were not mandated by the unit structure.

The remaining comments cited by petitioner deal with the costs associated with collective bargaining. The Board noted that the Robfogel testimony (Ct. App. Supp. App. 384-411) "relating to the costs for negotiations at a public hospital in Massachusetts with eight bargaining units (* * * where out-of-state as well as local attorneys appeared for each negotiating session) was not shown to be typical." J.A. 85. Moreover, the Board correctly noted that "it would not be suitable for the Board to reject appropriate bargaining units on the basis that the very things sought by collective bargaining—negotiating and grievance processing—can be obtained only at some financial cost. The statutory amendments enacted by Congress in 1974 represented an implicit policy decision that collective bargaining in the health care industry will produce countervailing benefits justifying the costs." J.A. 220.

A number of petitioner's *amici* seek to buttress petitioner's arbitrary and capricious challenge by arguing the impact of the regulation on particular hospitals. Of course, these arguments are irrelevant to the extent they are unsupported by references to the administrative record.

More fundamentally, pointing to a few submissions whose assertions may be at odds with an agency determination does not establish that the agency acted arbitrarily or capriciously. The Board's experience, supplemented by the rulemaking record, provided a more than sufficient basis for its conclusions.

* * * * *

Petitioner's claim that the regulation is "arbitrary and capricious" is, in essence, an ineffective effort to pick a few holes in a regulation that represents the fruit of some two years of exhaustive inquiry, analysis, and review. And the firm foundation on which the regulation rests also underscores the weakness of petitioner's effort to overturn it as somehow not in accordance with law. The regulation does not violate the agency's statutory mandate; it fulfills it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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